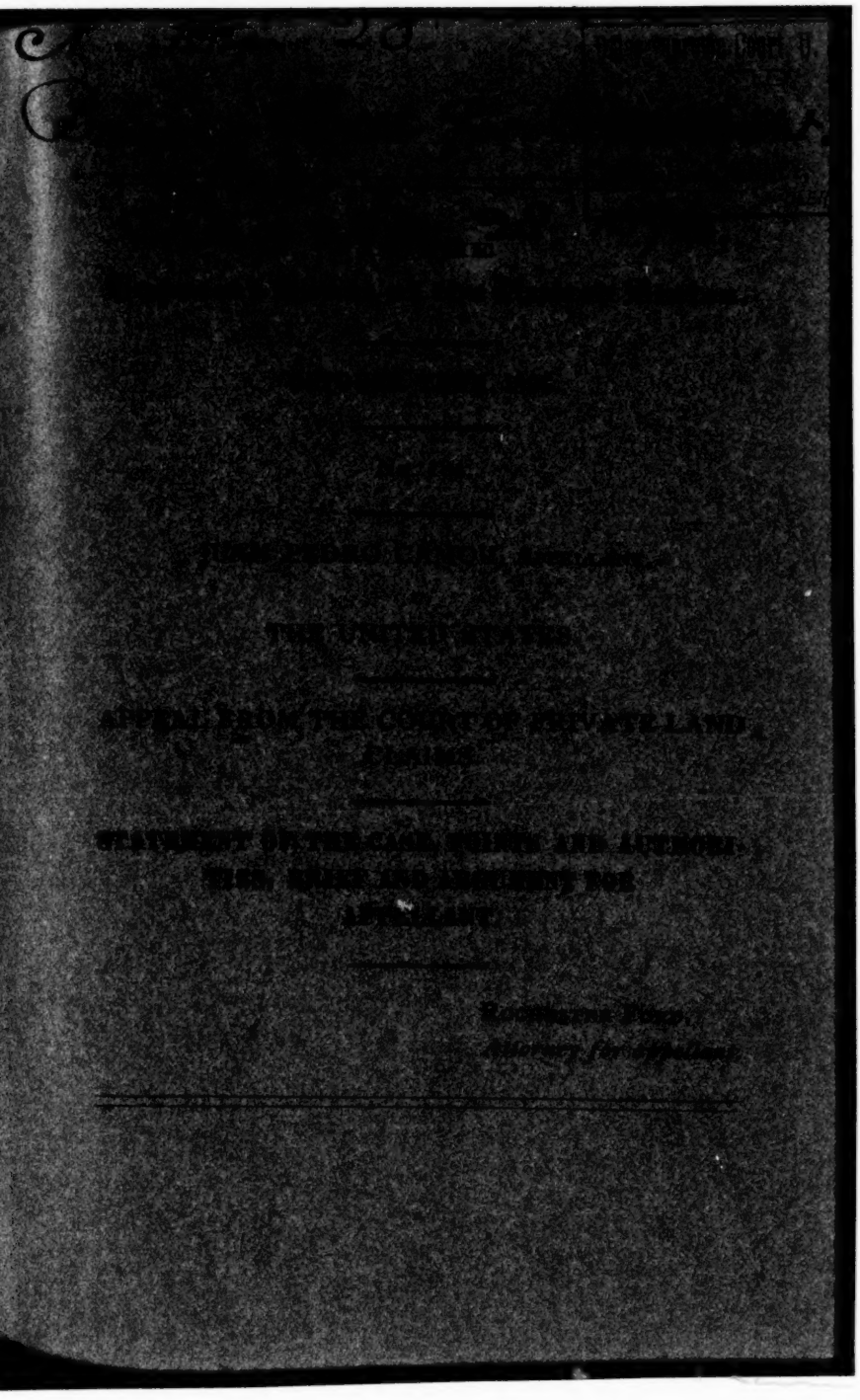

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 184.

JUAN PEDRO CAMOU, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT OF THE CASE, POINTS AND AUTHORITIES, BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

This case was instituted by the filing by appellant under the provisions of the act of March 3, 1891, of the petition and amended petition set out at pages 1-3 and 6-9

of the record. This petition alleged that petitioner, Camou, was the owner in fee of the tract of land known as the San Rafael del Valle grant, situated in the County of Cochise, Territory of Arizona, in the San Pedro valley, on both sides of the San Pedro river, between the range of mountains known as the Huachuca and the range known as the Mule mountains; that petitioner became the owner of said land by purchase and claims title to same through various mesne conveyances from the original grantee thereof, one Rafael Elias, who duly acquired his ownership and derived his title thereto by grant and conveyance from the duly constituted and authorized authorities of the State of Sonora, Mexico, under and by the authorization and sanction of the laws of the State of Sonora and of the Republic of Mexico. That the title to said lands and premises so derived and acquired as aforesaid was complete and perfect at the date when the United States acquired sovereignty in the Territory of Arizona, within which said lands are situate. That said grant was made and a patent issued therefor to said Rafael Elias under and by virtue of article 11 of the sovereign decree No. 70 of the general congress of the Republic of Mexico of the 4th of August, 1824, and the said patent was issued to said Rafael Elias on the 25th day of December, 1832, by José Maria Mendoza, treasurer general of the State of Sonora, in accordance with the above decree and under and by virtue of law No. 30 of the 20th of May, 1825, of the State of Sonora and Sinaloa (the constituent congress of the free, independent and sovereign State of the West), regulating the system of selling the public lands. That the said grant was upon the condition that the lands be kept occupied; that the grantees duly entered upon the possession of said lands and kept same occupied; that no breach of the conditions of said grant was ever claimed by the Republic of Mexico or the State of Sonora; that said grant had been

duly located and duly recorded in the archives of Mexico prior to the 25th day of September, referred to in article VI. of the Gadsden treaty; that the grantors and predecessors in interest of petitioners, who were the owners of said grant at the time of the adoption of the treaty of Gaudalupe Hidalgo and of the Gadsden treaty were Mexicans, citizens of the Republic of Mexico; that the said lands and premises have remained in the uninterrupted and peaceable possession of petitioner and his grantors and predecessors in interest; that the grant in question, according to the survey and map thereof by George J. Roskruge, Esq., June 1, 1891, contains 20,034.62 acres; that certain persons, who were named, were in possession of portions of said grant, but that such possession was without the permission of petitioner, and without any right whatever.

The petition further alleged that pursuant to the acts of Congress the U. S. Surveyor General of Arizona examined into the validity of said grant and reported favorably thereon, and recommended the same to Congress for confirmation, and the petition annexed as an exhibit the report of the Surveyor General. The petition prayed that the validity of the claim and title be inquired into by the court.

The record does not show that any answer was filed on behalf of the United States.

At the trial the petitioner called as a witness Rufus C. Hopkins, who testified (rec. p. 29) that under the act of Congress of July 5, 1870, he was delegated and appointed by the Department of the Interior to proceed to the capital of the Mexican State of Sonora and examine the archives to be found there, and there make transcripts and minutes of all title papers and proceedings therein relating to grants of lands within the Territory of Arizona and report their condition as to proper form, validity, etc.; that he had executed the duty entrusted to him; that he was at that time familiar with the Spanish language; that

among the Mexican archives he found the original expediente of the San Rafael del Valle grant, which was on stamped paper, and that he found an entry in the book of Toma de Razon, on which he made a copy. Witness further testified that his recollection was that he found the papers genuine, and that he so reported at the time; that the San Rafael del Valle grant conformed in the method of making the same to the manner which was in operation at the time of its date; that he had become very familiar with the signature of José Maria Mendoza.

Witness was shown the titulo of said grant and asked to state whether the signature on it was or was not the genuine signature of Mendoza, and replied that he thought it was the genuine signature.

The titulo was thereupon offered in evidence.

On cross examination witness testified as to the manner of making grants, and on re-direct examination that he thought there was nothing about this grant, from his investigation, to excite his suspicion at all.

A certified copy of the report made by Mr. Hopkins to the government of the United States was offered in evidence, and there was offered, also, a translation of the titulo and of the certificate to the record in the book of Toma de Razon, at Hermosillo, and copies and translations of certain deeds and instruments showing deraignment of title.

Witnesses were called who testified to the location of the landmarks and natural objects called for in the title papers, and certain maps identifying the location of the grant were introduced also. As to the monuments and possession, opposing evidence was offered by the United States.

The grant was rejected by a divided court. Three of the judges held that it was void because the decree of Santa Anna, dated November 25, 1853. The other two

judges dissented, filing a separate opinion, in favor of confirming the grant. The effect of the decree of Santa Anna was the sole point decided.

Petitioner was allowed an appeal and duly prosecuted same to this Court.

SPECIFICATION OF ERROR.

The court erred in holding this grant void because of Santa Anna's decree.

POINTS AND AUTHORITIES.

I.

This grant is not one of those comprehended in the decree of Santa Anna, for the reason that it was made with the express mandate and sanction of the general powers of the Mexican republic in the form prescribed by the laws.

See said decree, Nueva Coleccion Leyes y Decretos Mexicanos, vol. 2, pp. 939.

Clinton *v.* Englebrecht, 13 Wall. 434.

See report of Special Agent R. C. Hopkins, rec. pp. 12–27; also in The Public Domain, pp. 1125–1134.

II.

The decree of Santa Anna did not affect grants embraced in the territory acquired by the Gadsden purchase, because it was made after September 25, 1853, when the negotiations for the Gadsden treaty began.

See decree as above.

III.

Under the law of Mexico said decree was of no binding obligation until it was duly promulgated or published,

and it cannot affect grants within the territory acquired by the Gadsden treaty, because it cannot be presumed to have been promulgated in Sonora until after the signing of the treaty.

L. 1, Tit. 2, Book 3, Recop. Novisima.

Gonzales *v.* Ross, 120 U. S., 605, 616.

IV.

If Santa Anna's decree had any effect, it was waived by the United States by the Gadsden treaty.

See Art. VI. of said treaty.

U. S. *v.* Clarke, 8 Pet. 436, 460.

Mitchel *v.* U. S., 9 Pet. 711, 735.

V.

Santa Anna's decree was null and void *ab initio*, and was so declared by the constituent congress of Mexico in the use of the faculties which it had to review the acts of the executive.

See decree of October 16, 1856; Hall, p. 169.

VI.

The decree had no effect on lands coming under the jurisdiction of the United States because it was not incorporated in the treaty.

Haver *v.* Yaker, 9 Wall. 32.

U. S. *v.* Yorba, 1 Wall. 412.

Dissenting opinion of Judge Sluss herein.

ARGUMENT.

This grant was rejected, as above stated, by a divided court, two out of the five judges dissenting. The sole ground for its rejection was that it was supposed to be invalid because of the decree of Santa Anna of date November 25, 1853. As to this decree appellant submits two propositions:

1. This grant does not fall within the operations of that decree.

2. If it did, the decree does not affect it, because the decree itself was without authority.

The first of these propositions is a short and simple one. Very much has been said and can be said as to the powers of Santa Anna, but conceding for the sake of the argument at this stage that he had authority to make the decree, it is confidently submitted that the decree does not either in its terms or its intent affect this grant. On this short ground that this grant does not come within the decree, we shall first try to show that this grant should be confirmed.

The first and second articles of that decree declare that:

"The vacant lands *(terrenos valdios)* being the exclusive property of the nation, could never have been alienated by any title whatever, by virtue of decrees, orders and dispositions of the legislatures, governments, or authorities of the states or territories of the republic; wherefore such sales, cessions, and alienations as may have been made of the vacant lands, without the express order and sanction of the general powers in the form prescribed by law, are declared null and void."

Articles 3 and 4 provide for the resumption of all such public lands so alienated by the states or territories

without the authority of the Supreme government, and deprives the grantees of all rights of reclamation in the premises as against the republic. (See The Public Domain, p. 1129 for translation of first and second articles of this decree; Hall, p. 166).

As this decree declares null and void only such alienations of the vacant lands as were made "without the express order and sanction of the general powers in the form prescribed by law," it is quite clear that if this grant can be shown to have been made with the express order and sanction of such powers it does not fall within the decree. To determine whether it was made with such sanction it will be necessary to consider the relation which the state of Sonora bore at the time of making this grant to the general government, and to examine the legislation on this subject of the Mexican republic and the State of Sonora.

The starting-point of the separation of New Spain from Old Spain may be regarded as the proclamation of the Plan of Iguala (February 14, 1821) and its consummation by the signature of the Treaty of Cordova (August 24, 1821). These two acts constituted the Empire or Kingdom of New Spain. Independence was achieved September 27, 1821. The first Congress met November 7, 1823, and framed a constitution which went into effect October 4, 1824 The Acta Constitutiva by decree of January 31, 1824, created the states of the Federation, among which was the State of the West, "Estado de Occidente," composed of the provinces of Sonora and Sinaloa. Sonora was afterwards made a separate state by law of October 13, 1830. (Compiled laws of Mexico, Vol. 2, page 291, No. 875.)

On August 4, 1824, was passed the decree entitled "Classification of Rents," containing the following provisions among others:

"Articles 1-9. Belong to the general rents (revenues) of the Federation * * the national property, in which are comprehended that of the inquisition and temporalities and any other rustic or urban estates which belong or shall hereafter belong to the public treasury.

Art. 11. The rents (revenues) which are not comprehended in the previous articles belong to the states. (Nueva Coleccion, vol. 2, p. 131; Reynolds, p. 118).

The same Congress passed the decree of August 18, 1824, entitled "On Colonization," some of the provisions of which are as follows:

"The Supreme Executive Power provisionally appointed by the General Sovereign Constituent Congress, to all who shall see and understand these presents; know ye, that the said Congress has decreed as follows:

Art. 1. The Mexican nation offers to foreigners who come to establish themselves within its territory security for their persons and property; provided, however, they subject themselves to the laws of the country.

Art. 2. This law comprehends those lands of the nation not the property of individuals, corporations, or towns, which can be colonized.

Art. 3. For this purpose the legislatures of all the states will, as soon as possible, form colonization laws or regulations for their respective states, conforming themselves in all things to the constitutional act, generel constitution, and the regulations established in this law.

Art. 10. The military who, in virtue of the offer made on the 27th of March, 1821, have a right to lands, shall be attended to by the states, in conformity with the diplomas which are issued to that effect by the Supreme Executive power.

Art. 11. If, in virtue of the decree alluded to in the last article, and taking into consideration the probabilities of life, the Supreme Executive power should deem it expedient to alienate any portion of land in favor of any officer, whether civil or military, of the Federation, it can do so from the vacant lands of the territories.

Art. 16. The government in conformity with the provisions established in this law will proceed to colonize

the territories of the republic." (White's New Recopilacion, vol. i, p. 601; Reynolds, p. 121.)

This law was made effective by the rules and regulations for the colonization of the territories of the Republic of Mexico, November 21, 1828, the first article of which is as follows:

"It being stipulated in the sixteenth article of the General Law of Colonization of the 18th of August, 1824, that the Government, in conformity with the principles established in said law, shall proceed to the colonization of the territories of the Republic; and it being very desirable, in order to give to said article the most punctual and exact fulfillment, to dictate some general rules for facilitating its execution, his Excellency has seen fit to determine on the following articles:

1. The governors (Gefes politicos) of the territories are authorized (in compliance with the law of the General Congress of the 18th of August, 1824, and under the conditions herein specified), to grant vacant lands in their respective territories to such contractors (empresarios), families, or private persons, whether Mexicans or foreigners, who may ask of them, for the purpose of cultivating and inhabiting them." (Reynolds, p. 141.)

On May 20, 1825, the Constituent Congress of the State of the West passed law 30 for the sale of its lands. This law begins:

"No. 30. The Constituent Congress of the free, independent and sovereign State of the West has seen fit to decree the following provisional law for the purchase of the lands of the state," and sets out in detail the fees for the treasury of the state; the fees of surveyors; the fees for the last public offer, and contains general provisions in explanation of the law. (Reynolds, p. 129.)

Other decrees relative to the sale of its lands were passed by later legislatures of Sonora, which enactmeuts are contained in the organic law of Sonora of July 11, 1834 (Reynolds, 186).

The historic facts as to sales of public lands in the State of Sonora are set out in the report of Special Agent R. C. Hopkins, at pages 11-27 of the record herein, and are printed in the Public Domain also (pp. 1125-1134). After the passage of the law of May 20, 1825, sales were uniformly made by the State of Sonora and by no other granting power, up to the time when Sonora became a Department. The power to make such grants was in every case stated in the title papers as the same, viz.:

"Inasmuch as article 11 of the general sovereign decree No. 70, dated August 4, 1824, conceded to the states the revenues which in said law the national government did not reserve to itself, one of them being that derived from the lands within their respective territories, which in consequence belong to them, for the disposition of which the honorable constitutive congress of the state that used to be joined of Sonora and Sinaloa enacted the law No. 30 of May 20th of 1825, as well as the decrees relative thereto passed by other succeeding legislatures," etc.

As a matter of unquestioned history, for ten years after the law of May 20, 1825, Sonora habitually sold lands, using the form shown by this San Rafael del Valle grant, as just quoted, and claiming the lands as hers, and this was done without a word of protest from the general government.

As stated at the outset of this discussion, the decree of Santa Anna did not attempt to declare void all conveyances of lands made by the states. If the state had sold lands with the full knowledge and consent of the general government, such a sale was not brought in question by the decree. Even Santa Anna did not attempt to put the Mexican government in the position of having assented to sales and afterwards declaring them void.

We now submit that this grant comes within the exception of this decree. It is not one made "without the express order and sanction of the general powers in the

forms prescribed by law," and therefore is not among those declared void. Such sales as this were in the forms prescribed by law, and were made under the express provisions of the law of the general government, and with its sanction and approval and consequent ratification. This is clear, as we think, from the following considerations:

Sonora in all her sales, such as this one, lays her claim to title to the lands in "article 11 of the sovereign decree No. 70 of the general congress of the union," of date August 4, 1824. The interpretation which the state gave to this article is, as shown, that it "concedes to the states the revenues which in said law the general government did not reserve for the federation itself, and one of such revenue being that derived from the lands within the respective borders of the states, such lands, in consequence, belonged to the states," etc.

The decree of August 4 classifies certain revenues which belong to the general revenues of the federation. The revenue from public lands is not mentioned as one. Article 11 then declares that "the revenues not included in the foregoing articles belong to the states."

How is this article to be interpreted, and what did it embrace?

If there is any doubt as to its meaning, one of the most pertinent questions that can be asked is, How did the parties themselves understand and construe the article at the time? In Topliff *v.* Topliff, 122 U. S. 121, the Court said that "in cases where the language used by the parties to a contract is indefinite and ambiguous and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. In an executory contract, where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one." So, "in

the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called to carry it into effect is entitled to great respect, and such construction ought not to be overruled without cogent reasons." Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727; Brown *v.* U. S. 113 U. S. 568.

It is evident that the practical construction given by the states of the Mexican Republic to the decree of August 4, 1824, was that one of the revenues reserved to the states was from the vacant lands, and this was construed to mean that "in consequence thereof such lands belonged to the states."

This exact form of language was used in all the grants made—and they were made in large numbers—by the State of Sonora between 1825 and 1835. On October 3, 1835, the states were abolished, the central system was introduced, and Sonora was turned into a Department. On August 22, 1846, the Departments were abolished and the states re-established. During the period of the central system, Sonora acted as a Department, and after the re-establishment of the states she again issued titles to lands on sales made as a state. This is shown by the San Ygnacio de la Canoa grant, confirmed by the Court of Private Land Claims. In that case the proceedings were instituted in 1821 and the land sold in that year, but final title in form was not issued till February 2, 1849. When the title was issued on that date by the proper official of the State of Sonora, it contained the same recital, viz., that inasmuch as "article 11 of the general sovereign decree dated August 4, 1824, conceded to the states the revenues which in said law the national government did not reserve to itself, one of them being those of the lands within their respective districts, which therefore belonged to them," etc.

The title paper in the grant now before the Court is dated December 25, 1832. From that date to February

2, 1849, is over 16 years. During all of these sixteen years, when the State of Sonora issued titles the written construction given by her to article 11 was invariably the same, namely, that by virtue of it the vacant lands in the state belonged to her.

Such was the contemporaneous and unvarying practical construction given to this article 11 by one of the parties to it. How was the same article regarded by the other party, the general Mexican government?

The answer to this is that the general government construed it in exactly the same way. This is shown too clearly to be disputed.

First: Section 8 of Article 161 of the Federal constitution of 1824 made it the duty of each Mexican state—

"To present annually to each one of the houses of the General Congress a minute and comprehensive report of the amounts that are received and paid out at the treasuries within their limits, together with a statement of the origin of the one and the other and touching the different branches of agriculture, commercial and manufacturing industries," etc.

Under section 9 of Article 161 of the same constitution each of the states was obligated—

"To forward to the two chambers (of the Federal Government) and when they are in recess, to the Council of the Government, a certified copy of their constitutions, laws and decrees."

In Clinton *v.* Engelbrecht, 13 Wall. 424, referring to a law of Utah, this Court said:

"In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the Territory to transmit to that body copies of all laws on or before the first of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

Under the reason of this decision we submit that the fact that the constitution and law of Sonora of 1825 were not disapproved by the general government must be considered as an approval of them. The general government promptly annulled laws of the State of Sonora which were considered objectionable, and did this from the earliest days. For instance, the decree of the federal government of March 9, 1829, declares that the decree of the State of the West, No. 97, of December 20, 1828, relative to one D. Francisco Iriarte, is contrary to Article 157 of the federal constitution. (Vol. I, Leyes y decretos Mexicanos, p. 7.)

This is cited as one of the many instances showing both that the Mexican general government knew what was being done in the states and that it disapproved what it did not like. Therefore, its disapproval of certain laws is an approval of other laws as to which it was silent, and it follows that the laws of the State of Sonora providing for the sales of its lands received the sanction and approval of the general government.

Second: Moreover, on March 26, 1826, the Mexican congress passed a law requiring the commissaries general, who were the chief federal officers in each state, to transmit to the general government a collection of all the decrees, orders and regulations passed by the congress of each state (2 Galvan's Nueva Coleccion, p. 634). That the law of Sonora in which she claimed to her own lands was thus brought before the general government cannot be doubted.

This Court had before it in Ainsa *v.* U. S., 161 U. S. 208, the testimonio of the Los Nogales de Elias grant. That title paper was issued April 7, 1843, while the central system was in force and while Sonora was a Department. All the officials who acted were, as they styled themselves, Departmental officials and not officers of the State of Sonora. The grant was issued by the treasurer of the

Department of Sonora in the name of the Mexican Nation. Its genuineness or record in the book of Toma de Razon was not called in question by the United States. The preamble or recital of authority in that grant is as follows:

"Whereas article 11 of the sovereign general decree No. 70 of the 4th (printed 10th by some error) of August, 1824, ceded to the old States the revenues which in said law the General Government did not reserve to itself, one of which is that from the lands (terrenos) in their respective districts, which therefore belong to them, and for the disposal of which the Honorable Constituent Congress of the state which was Sonora and Sinaloa united law No. 30 of the 20th of May, 1825, as did also the successive legislatures other decrees concerning them, which enactments have been retained in sections 3d, 4th, 5th, 6th and 7th of chapter 9 of the organic law of the treasury, No. 26, of the 11th of July, 1834," etc.

We cite this as a direct and explicit statement by the officials of the Mexican government adopting the construction which Sonora had put upon the law of August 4, 1824, that the vacant lands in the State belonged to her.

And this Nogales grant is not the only one containing such statements. The Agua Prieta grant is pending before the Court of Private Land Claims. Its genuineness and record in the book of Toma de Razon have not been called in question by the United States. Its title paper shows that application was made to the treasurer general of the State of Sonora on July 21, 1831. A survey was ordered and officials and witnesses appointed in the usual form, but the proceedings were delayed owing to the incursions of the Apache Indians. Final title was issued December 28, 1836, by the treasurer general of the Department of Sonora, based on the proceedings instituted under the state. The preamble is the same as the one just quoted from the Nogales grant.

These instances are cited as showing that the proceedings instituted under the states when the federal system was in force were continued and completed and final title issued by the Departments under the central system. It shows that the laws of the State of Sonora for selling her lands were known to the officials of the Mexican government, and what is all-important, that the officials of that government put on such laws the same construction as did the state, namely, that by virtue of article 11 of the law of August 4, 1824, the vacant lands belonged to the states.

Grants issued by the State of Sonora and by the Department of Sonora were recorded in the same book of Toma de Razon. The record in this case shows that the San Rafael del Valle grant was recorded on page 11 of that book. The Canoa grant, heretofore described as issued February 2, 1849, was recorded on page 75 of the same book. This is the only book of Toma de Razon subsequent to October 24, 1831, and all of the grants made by the State of Sonora and by the Department of Sonora which were recorded after October 24, 1831, were recorded in this book. As a matter of fact, large numbers of grants made by the State of Sonora prior to October 3, 1835, when the central system went into effect, are recorded in this book. The grants issued by the Department of Sonora under the central system follow in chronological order in the same book, and then the grants issued after August 22, 1846, when the State form of government was again resumed, are recorded in chronological order in the same book. All grants of lands in the territory sometimes called the state and at other times the Department of Sonora were recorded as made in this one book.

The expedientes or matrices of grants in the same territory, whether made by the state or Department of Sonora, are preserved in the archives of Mexico, at Hermosillo, where they remain to the present day.

The attention of the Court is called to this fact of the entries in the book of Toma de Razon as showing that the sales of lands by the State of Sonora and the laws under which they were made must have been known to the general Mexican government. In fact, it was a physical impossibility for the Departmental officers not to see these entries. When, under the Department, the book of Toma de Razon was opened for the record of a sale of land, there, staring the treasurer general of the Department in the face, were the entries of the numerous sales made by the treasurer general of the State of Sonora. The officers of the national government could not help seeing these entries if they tried. When the commissary general or any other official of the general government looked at this book or at the archives, there he found the expediente of sales made by the State of Sonora, all duly recorded in the book of Toma de Razon.

In view of the facts above set out, which are only a small part of the ones that could be cited, it is submitted that it is simply impossible to believe that the national Mexican government was ignorant of the fact that sales of lands were habitually made by the State of Sonora, or ignorant of the laws under which such sales were made.

In fact, the specific proof is contained in the record of this case that such grants as the one now under consideration were actually brought before the honorable Congress of Mexico. On page 199 of this record is the statement made by the treasurer general of the State of the West, under date of April 25, 1828, that title to a grant of land sold in April, 1828, "cannot now be issued until the honorable Congress (of Mexico) determines the question propounded by the supreme government of the State in regard to the issue of these documents."

To the writer of this brief it has always seemed a principle not to be shaken that our courts, in the language

of this Court in Hornsby *v.* U. S., 10 Wall. 224, "cannot, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were entrusted with their execution." In the language of the Supreme Court of Texas in Hancock *v.* McKinney, 7 Tex. 384, at page 442: "The construction of their powers and of the laws which conferred them, adopted and acted upon by the authorities under the former governments of the country, must be respected until it be shown that they have clearly transcended their powers or have acted manifestly in contravention of law."

Applying to this case the principle which this Court has laid down in other cases, the question of the construction and effect of Santa Anna's decree can, it seems, be easily disposed of. The conclusions which seem to follow from the facts given above are these:

The decree of August 4, 1824, was passed by the general constituent congress in Mexico.

Article 11 of that decree provides that "the revenues not included in the foregoing articles belong to the states."

The meaning of this article as shown by the construction given to it by all the authorities, state, Departmental and national, is that the vacant lands belonged to the state.

This article, is therefore, an "express order" or express mandate of the general powers," conferring upon the states the right to dispose of the vacant lands within their borders.

Sales like the one under consideration were made with the "sanction of the general powers" by virtue of this article 11 and by virtue of the fact that such sales were actually sanctioned. For the general government to permit Sonora to make sales of lands year after year

without disapproving such sales is a "sanction" of them.

This grant, therefore, is not within the letter or the intent of the Santa Anna decree.

This record shows (p. 108) that the sale of the lands was made on the advice of the attorney general of the State of Sonora, one Manuel de la Brena. This Court in Mitchell *v.* U. S., 9 Pet. 716, at page 742, had under consideration the validity of a sale which had been made under the advice of a Spanish attorney general, and held that as the grant was made on such advice the presumption was very strong, if not irresistible, that everything preceding it had been lawfully and rightfully done. It would certainly seem that a Mexican attorney general knew more of the law of his own country at the time than we could now know.

A good deal of confusion has been injected into the subject of the sales of lands made by the State of Sonora by confounding two laws which are entirely different. These laws, are, first, article 11, of August 4, 1824, which gave to the states the right to sell their lands, and, second, article 3 of the decree of August 18, 1824, which provides that for the purpose of colonizing lands with foreigners "the Congresses of the States shall enact, as soon as possible, laws or regulations for the colonization of their respective demarcations, in strict conformity with the Constitutive act, the general constitution and the rules established in this law." Reynolds, p. 121.

As a matter of fact, Sonora did not pass a colonization law till May 6, 1850. Such law referred distinctly to the colonization of foreigners, and is as different in its intent and provisions from the laws of Sonora of 1825 and 1834, which provided for the sales of land to Mexican citizens, as one thing could well be from another. This first colonization law of Sonora was promptly annulled by the Mexican nation on May 14, 1851, as unconstitutional. The fact that this objectionable colonization law was

annulled, while no reference of disapproval of the laws of 1825 or 1834 was ever made shows that these laws were considered valid and effectual.

A short resumé may be of value, showing some of the constitutional and statutory expressions of the claim of Sonora to own her lands.

1. The constitution of Sonora (State of the West) declares (article 47) that the right of selling lands (tierras) belongs to the state. This constitution bears date May 11, 1825.

2. Law No. 30, of May 20, 1825, of the constituent congress of the State of the West provides that the congress "has seen fit to decree the following provisional law for the purchase of the lands of the state."

3. Decree of Sonora of May 30, 1834, setting time to obtain titles.

4. Organic law of the treasury of Sonora of July 11, 1834, stating (article 53, sec. 2, Reynolds, p. 187) "the revenues and fees established in the state are * * * revenue from the composition and grant of lands," and providing, article 57, for the sale of lands, which were to be registered "in the name of the state." Article 60 is "The treasurer (of the state) as the immediate chief of the revenues, shall make the sales and issue the titles."

In the work above referred to, compiled by Mr. Reynolds, it is stated, p. 34:

"By the law of April 25, 1835, the frontier and litoral states were prohibited from selling the vacant lands within their boundaries without the previous approval of the general government. Attention is called to this law."

When attention is directed to the law itself, it will be seen, as we submit, that its terms in no wise bear out the construction put upon it by Mr. Reynolds. The language of the law is (Reynolds, p. 193):

"Article 1. The decree of the legislature of Coahuila and Texas of March 14 of the present year is, in its

articles 1 and 2, contrary to the law of August 18, 1824; consequently the alienations made by virtue of said decree are null and of no value.

2. In the exercise of the powers the general government reserved to itself in Article 7 of said law of August 18, 1824, the border and litoral states are prohibited from alienating their public lands for colonization thereon, until the rules they shall observe in doing so are established.

3. If any of them desire to alienate any part of their public lands, they shall not have power to do so without the approval of the general government, which, in every case, shall be preferred if it sees fit to take them, and shall give the states the proper indemnity.

4. The general government can, under articles 3 and 4 of the law of April 6, 1830, by virtue of its preference right, purchase of the State of Coahuila and Texas the four hundred sitios it says it is under the necessity of selling.

This seems to be a pointed and unequivocal statement and admission that the states owned the lands in their borders.

Article 3 of the decree of April 6, 1830, is that

"The government shall have power to appoint one or more commissioners to visit the colonies of the frontier states. to contract with their legislatures for the purchase, in the name of the Federation, of the lands they may consider suitable and sufficient for the establishment of colonies of Mexican and of other nations, to enter into such arrangements with the colonies already established as they may deem proper for the security of the Republic, to see to the exact compliance with the contracts upon the entry of new colonists, and to examine as to how far those already entered into have been complied with.

4. The executive shall have the power to take the lands he may consider suitable for fortifications and arsenals, and for new colonies, and shall give the states credit for their value on the accounts they owe the Federation."

It is submitted that the resources of the Spanish or English language would be inadequate to convey any more fully the statement that the lands belonged to the states,

and that they could not be taken even by the general government without payment to the states therefor.

The decree of April 25, 1835, does not, as stated in Mr. Reynolds' work, prohibit the states from selling their lands without the previous approval of the general government. The decree states that "the border and litoral states are prohibited from alienating their public lands for colonization thereon" until the rules they shall observe in so doing are established.

The power in the general government to make this prohibition is stated to be "reserved to itself in article 7 of said law of August 18, 1824, which is

"Prior to the year 1840 the General Congress shall not prohibit the entry of foreigners to colonize, unless imperious circumstances force it to it with respect to the individuals of some particular nation."

But, as we have shown, the grant now under consideration was not a colonization sale or grant to foreigners, but a sale to Mexican citizens. It was not made under any provision of the law of August 18, 1824, but under the law of August 4, 1824. The decree of April 25, 1835, referred only to the law of August 18, 1824. It has no reference either in terms or intent to sales to Mexican citizens made under the law of August 4, 1824.

The further statement is made on page 35 of Mr. Reynolds' work that

"April 4th, 1837, the colonization law and all other land laws were repealed."

But a reference to the law itself shows at once, as is submitted, that it does not repeal all other land laws. The language of the law is that "the government * * shall not be compromised by the laws heretofore enacted on colonization, which enactments are all repealed, in so far as they conflict with this law, but the prohibition of article 11 of the law of April 6, 1830, shall remain in force."

The enactments repealed are those on colonization. The law is restricted to these. In makes no reference to sales to Mexican citizens under the law of August 4, 1824. Article 11 of the law of April 6, 1830, refers to "the exercise of the power which the general Congress reserved to itself in article 7 of the law of the 18th of August, 1824," by which "it is forbidden to colonize foreigners of adjacent countries in those states and territories of the Federation which adjoin their nations."

The federal government of Mexico by its Ministers of the Interior issued on May 25, 1838, the circular approved by the President of the Republic (3d vol. Comp. Laws of Mex., p. 557). This circular is indexed (p. 806 of said 3d volume) as "Leyes de las Estados. Están vigentes las que no están expresamente derogadas?" the translation of which is "Laws of the States. There are in force those which are not in direct terms annulled." The full text of the circular is as follows:

"It must be principally noted that there are in force all such laws as are not openly inconsistent with the prevailing system and unless they are found to have been expressly repealed by any other subsequent disposition, this rule also holding good in regard to those laws which were decreed (passed) in the very remote epochs, and under the different forms of government which the nation has had; and that, therefore, the courts and other authorities daily transact their various duties under the existence of the laws of the Cortes of Spain, of the laws of Partidas and Compilation, as long as this disposition is not repugnant, more or less, to the form of government in which they were sanctioned.

"This principle being established, there follow two natural consequences; the first is, that there ought to be considered as in force the laws of the old States, whenever these contain the requisites mentioned above, unless they are repugnant to the form of government under which they had their origin, or unless the supreme government has enacted any other, since their requirements cannot be superior (paramount) to the laws.

"The other consequence is, that if the orders of the government were the result of some of its constitutional attributes, or of some other subsequent law that authorized such or another act, then the laws of the States ought not to be considered as in force, not because they are repugnant to the requirements of the government, but because the law authorizes it to decree this or the other decree contrary to it, by the same right that any other decree is abolished by former legislation.

"From the foregoing it is the opinion of the commission that the advice of the government can be obtained, unless the council, with better judgment, resolves differently.

"Be pleased, your Excellency, to advise his Excellency and receive the documents which were transmitted.

And this being approved by the President, he has seen fit to order it to be communicated to the governors of the departments, so that they may take notice of this decision for the general good."

In the case of Ainsa *v.* U. S., 161 U. S. 208, *supra*, where the grant was made by Departmental officers under the central system of government, the Court will notice that it is stated by the Departmental officials in 1841 that "decree No. 51 of the 12th of May, 1835, of the old state (Sonora) is still in force."

This is another of the very many proofs that the laws of the State of Sonora were known to the general government, and had not been repealed by it, but, on the contrary, were expressly admitted to be in force.

And still later, in 1849, state ownership of the vacant lands in Sonora is expressly recognized by the federal government in the communication of August 30, 1849, from that government to the governor of the State of Sonora, as follows (Reynolds, p. 294):

"Most Excellent Sir: The Supreme Government is informed that on account of the disturbances in Upper California, especially in the gold placers, robbery and murders have increased, and that the hatred of Mexicans, Spaniards and Chilians has gone so far as to prevent their

living there, and that they have been forcibly compelled to re-embark, and further information has been added to this which indicates that in that country there are no social guarantees.

This has attracted the attention of his Excellency, the President, and he therefore directs me to say to your Excellency that he expects you to do all that is possible to attract to yourself this population, in the understanding that public lands will be given to the emigrants on credit, and, that, if that State does not cede them gratuitously or if the emigrants cannot pay, it will be given them nevertheless, as the General Government obligates itself to indemnify said State in the manner to be determined at the proper time by the General Congress.

God and Liberty. Mexico, August 30th, 1849,

Lacunza."

As has been stated, Sonora did not pass a law for colonization, as opposed to the laws for the sales of lands to Mexican citizens, till May 6, 1850, and this law was annulled by the Mexican Nation on May 14, 1851. In citing this last-mentioned law, the work by Mr. Reynolds prefaces it with the statement that it "annulls decree of the State of Sonora declaring public lands belong to Sonora, and provides for colonizing the same." This declaration also is misleading. The law of Sonora was not declared unconstitutional because of the declaration of Sonora that the public lands belonged to her, because, as frequently stated therein, her ownership of such lands was always conceded in every way possible — by acquiescence and by express admission. The right claimant by the general government was not of title to the lands but the one of establishing basis for colonization, and the power of the general government is again stated to rest on article 2 of the law of April 25, 1835: "In the exercise of the power reserved to the general Congress in article 7 of said law of August 18, 1824, the frontier and litoral states

are prohibited from alienating their vacant lands for colonizing until the regulations to be observed in carrying it out are established."

The other states, also, of the Mexican republic passed laws for the sales of their lands. The colonization law of the State of Coahuila and Texas, enacted in 1825, recites that—

"The governor provisionally appointed by the Sovereign Congress of this state to all who shall see these presents: know that the said Congress have decreed: Decree No. 16. The Constituent Congress of the free, independent and sovereign state of Coahuila and Texas, desiring by every possible means to augment the population of its territory; promote the cultivation of its fertile lands; the raising and multiplication of stock and the progress of the arts and commerce; and being governed by the Constitutional act, the Federal constitution and the basis established by the National decree of the general Congress, No. 72, have thought proper to decree the following law of colonization," etc.

The State of Tamaulipas enacted a similar law in 1826. (See Chambers *v.* Fisk, 22 Tex. 504, 529, 530.)

In passing on the question of the title of the State of Coahuila and Texas to her lands, the Supreme Court of Texas in Blount *v.* Webster, 176 Tex. 616, reviews the history and legislation of Mexico, and say, page 619, "By virtue and operation of this law (August 18, 1824) the public lands lying within the said states became severally and respectively the property of the states in which they lay."

The subject was considered even more fully in Chambers *v.* Fisk, 22 Tex. 504. In that case the court point out, at page 527, that the constitution of Texas, after asserting its independent sovereignty, except as to the powers delegated to the general government, assumes to claim that "all kinds of vacant property within its limits, and all intestate property without a legal successor,

shall belong to the state (art. 15)," and that the congress of the state shall have power to "enact what is proper for the administration, preservation and alienation of the property of the state (art. 97);" and the court say: "Here is an open, express claim of right to the vacant domain in the state, with the full power of disposition. These provisions of the constitution of the state are not annulled or controverted in any way by the general government; nor was any law of the state assuming this right sought to be controverted by the federal authorities until April, 1835, after the weight of the supreme executive power and other inherent defects of its organization had given the government a direction, with an irresistible drift, towards centralism, which was carried to its entire consummation under the 'plan of Toluca,' in 1836, by the adoption of the 'central constitution.' Mayer, Mexico, 399; 1 White's Recop. p. 626." Concluding its opinion the court say: "We have arrived at these conclusions upon the main question at issue, because we have not been able or willing to repudiate the right of what was then our own state, Cohuila and Texas, to the ownership of her vacant domain and her right to dispose of it as attempted by her in this case in accordance with the rights assumed by her in her constitution and laws, virtually and plainly recognized by the federal authorities in 1830, and never sought to be controlled or prevented, except on reasons of federal policy, in reference to the introduction of colonists from the United States of the north: and then only in 1835, when the over-grown usurped power of the general government was on its march to the annihilation of the states."

The same conclusion had been reached in Republic v. Thorn, 3 Tex. 499, where the court say, at page 509: "From a review of these laws on the subject of colonization, it will appear that extensive authority over the public lands generally was vested in the state; that she possessed the property in the soil and had alone the power by direct

agency of appropriating lands to individuals; that this power was never assumed by the general government during the existence of the confederacy, but its exercise by the state could be, to some extent, paralyzed by virtue of faculties reserved in the general law of colonization, and that, in fact, after 1830, the operations of colonization were from that cause much embarrassed and retarded. But no attempt was made to effect an entire suspension of the power of the states over the public lands until the law of the 25th April, 1835, when, by an arbitrary perversion of the 7th article of the law of 1824, the congress assumed the power of prohibiting further sales of land for colonization until regulations should be made by which such colonization should be controlled."

This Court has announced the same holding. In Spencer *v.* Lapsley, 20 How. 264, decided at the December term, 1857, the Court say, at page 269: "The power of the governor of those states, Coahuila and Texas, to sell lands to Mexicans, not exceeding eleven leagues in quantity, is unquestionable." This language was used in reference to a sale made October 4, 1833, and of it the Court say: "The title emanated from the State of Coahuila and Texas a quarter of a century ago, when Texas was a wilderness," and "a power in the colonial governor or political head of Texas to make grants is conceded in its utmost extent (page 275)."

So many cases have been passed on by the Supreme Court of Texas and this Court where titles emanated from the State of Coahuila and Texas and were held good, that it would be tiresome to enumerate them all. White et al. *v.* Burnley, 20 How. 235, is a case where this Court upheld the validity of a grant made by the Mexican State of Texas on April 11, 1835.

What has been held as to the State of Coahuila and Texas will apply, of course, with equal force to the State of Sonora. When that state passed the law of May 20,

1825, for the regulation of the purchase of the lands of the state, it was an open, express claim of right to such lands, with the full power of disposition, and up to the time the grant under consideration was issued was in no way annulled or controverted by the general government of Mexico.

"The express order and sanction" of the decree of Santa Anna refer to the time when the grants covered by the decree were made, and not to a subsequent time; that is, if a grant at the time it was made was made with this "express order and sanction," there is no intention of annulling it by reason of anything occurring afterwards.

This Court in the Arguelo case, 18 How. 539, *supra*, speaking of the policy of Mexico with regard to the sales of lands to their own citizens, said:

"While a judicious policy might forbid the settlement of large bodies of foreigners on the boundaries and sea-coast, we cannot impute to them (the supreme government of Mexico) the weakness or folly of confining their native citizens to the interior, and thus leaving their sea-coast a wilderness without population. On the contrary, the same considerations of policy which excluded foreigners would encourage the settlement of natives within those bounds. The statute books of Mexico abound in acts offering every inducement to Mexican families to settle on the frontiers."

It is a notorious historical fact that at the time of the execution of this grant Sonora was devastated by the Apache Indians. It was to the highest interests of the Mexican government that those marauders should be kept in check. For this purpose it was necessary to sell lands to Mexican citizens. The fact that the general government passed no laws for such sales shows that this power was committed to the states. Unless this view be taken, we have to suppose that Mexico did not herself propose to sell lands on the frontier or permit the state to do so, and this at a time when the preservation of the country

depended on lands being sold and settled. This would indeed be imputing to Mexico "weakness and folly."

Any further evidence that Sonora claimed to own her vacant lands and that the general government laid no claim to them may seem only cumulative, and there are some other facts so clearly showing how the vacant lands were regarded that we hope they may receive the further attention of the Court.

In 1870 the Mexican government officially published the "Memoria de Hacienda y Credito Publico," a history of the treasury department of the nation, going back before the revolution of 1821. On page 62 is given a table showing the revenues prior to the revolution. One of them is from the "ventas, compras y confirmaciones de tierras," or proceeds from the sales of lands. On page 80 is given a table prepared and submitted to the general government in 1825. It is an estimate of the various revenues which the government might be expected to receive, and shows the sources from which the revenues would be derived. The table is as follows:

"Extracto de los valores, gastos y líquido de las rentas generales correspondientes á la Federacion por los soberanos decretos números 70 y 81.

RAMOS.

Derechos de importacion y exportacion.
Idem de internacion.
Renta del tabaco, incluyendo en la columnilla de gastos la compra y fletes.
Renta de pólvora.
Alcabala que paga el tabaco en los países de su cosecha.
Renta de correos.
Renta de lotería.
Renta de salinas.
Las de los territorios de la Federacion.

Bienes nacionales; fincas rústicas y urbanas del fondo piadoso de Californias, de temporalidades y de inquisicion.

Rentas decimales en las ocho catedrales de la nacion.

Idem de la mitra de México.

Idem de la dignidad de teserero.

Contingente de los Estados.

Avería

Casa de moneda.

Peaje.

Créditos activos; deudores á la renta de salinas, de cuyo cobro hay esperanzas.

Préstamo extranjero."

There is not the slightest intimation here that the Mexican government claimed any revenue from public lands, "tierras." As will be seen from page 2 of the dissenting opinion of Judge Sluss herein, "bienes nacionales" and "fincas rústicas urbanes" have no reference to the public domain.

We have thus the declarations of the State of Sonora and of the Mexican government, made at the time. Sonora in her constitution, article 47, as heretofore quoted, claimed the revenue from the "confirmacion de tierras," that is, the right to sell the public lands and retain the proceeds. Mexico in summarizing all her prospective revenues makes no mention of sales of lands. The careful and complete enumeration of certain revenues is the exclusion of others, and it would seem that nothing could be clearer than that the national government made no claim in any manner to the vacant lands within the states.

III.

Under the former law of Mexico it is submitted, as stated by this Court in Gonzales *v.* Ross, 120 U. S., 605, 610, that the laws were of no binding obligation until after they were duly promulgated. It will be seen from

the original text of the decree of Santa Anna, (Nueva Coleccion Leyes y Decretos Mexicanos, vol. 2, p. 939), that although it is dated November 25, 1853, it was not ordered to he promulgated until December 2 of the same year. This Court held in Gonzales *v.* Ross, *supra*, that is was not probable that an act of a Mexican State Congress passed at the city of Monclova, March 26, 1834, was promulgated at Dolores, a point about 200 miles distant, prior to the 18th of the following April, 23 days. The Gadsden treaty was signed December 30, 28 days after the decree of Santa Anna was ordered to be promulgated. As the State of Sonora was more than 1000 miles distant at its nearest point from the City of Mexico, it cannot be presumed that Santa Anna's decree had been promulgated there at the date of the signing of the treaty, and therefore it had not taken effect there.

Moreover, we submit that this decree cannot effect the treaty because it was issued after September 25, 1853, when the negotiations for the treaty began.

IV.

The language and construction of article VI of the Gadsden treaty cannot, as we submit, be taken in any way will invalidate this or similar grants. The language of that article is "or will any grants made previously (to September 25, 1853) be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico." By the universal principle of construction the expression of one thing is the exclusion of others. The expression of what grants were to be considered invalid, namely, those which have not been located and duly recorded, excludes the idea that any others were to be considered invalid; that is to say, all other grants were to be considered valid, and this article of the

treaty conveys exactly the same meaning as though the wording were "and all grants made previously (to September 25, 1853,) will be respected and be considered obligatory which have been located and duly recorded in the archives of Mexico." Does this mean "all grants made by the Mexican republic?" Certainly not. There is no qualification or restriction as to the authority or granting power, and no such restriction can be implied. The treaty says, in its legal interpretation, "all grants will be respected," provided they bear date prior to September 25, 1853, and provided they had been located and duly recorded, and as a matter of course, the grants made by the State of Sonora, like the one now under consideration, would be included.

The position of the United States as to the supposed invalidity of this grant because of want of title in the State of Sonora can be advocated only by making article VI. of the treaty read, in effect, nor will any grants made by the State of Sonora and not approved by the Mexican republic be considered valid." But, as above shown, this qualification cannot be imported into the treaty. As to this, the language of this Court in Newhall *v.* Sanger, 92 U. S., 761, is sufficient authority. In that case this Court construed a statute which provided that "lands claimed" under any foreign grant or title, in California, were to be reserved from preëmption or sale. It was contended that this meant "lawfully" claimed, but the Court repudiated this construction and held that the statute meant "actually" claimed, and that the word "lawful" could not be imported into it to change its meaning.

So, we submit, the sixth article of the treaty cannot be changed by first inserting, in effect, the word "lawful," and then claiming that no grants were lawful which had been made by the State of Sonora. The words "any grants" cover all grants, whether made by the State of Sonora or not. If grants made by the State of Sonora

were not to be respected, then the sixth article of the treaty is almost entirely superfluous, for these were almost all the grants there were.

The treaty must stand as it is. "The court will not alter, amend, or add to any treaty by inserting any clause, small or great, any more than in a law." (The Amiable Isabella, 6 Wheat. I.)

"Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred. Such is the settled rule." (Hauenstein *v.* Lynham, 100 U. S. 483.) Under this rule, article VI. of the treaty must be construed so as to uphold and not to invalidate the rights claimed by Mexican grantees.

The answer to the claim of the United States on this point of supposed want of title in the grantor is this, as it seems to us: The claim of the Mexican republic that the states did not own the lands within their limits, and, therefore, could not have made valid sales of them, was known at the time of the treaty to both the Mexican and the United States authorities. If neither nation proposed to recognize the grants made by Sonora, this fact would have appeared in some form in the treaty. As it does not appear, it is plain that if the Mexican republic had any claim to such grants, she waived her claim by this sixth article. In the same way, if the United States had any claim that the lands covered by these grants made by the State of Sonora had never been legally sold, and that the title to the same was in the Republic of Mexico and would therefore pass to the United States by the treaty, such claim was clearly waived by this sixth article, which undertakes to respect all grants prior to a certain date, provided only that they had been located and duly recorded.

Counsel base this line of reasoning on the decision of the Court in U. S. *v.* Clarke, 8 Pet. 436, 463. There, in

construing the treaty of February 22, 1819, the Court say: "While Florida remained a province of Spain, the right of his Catholic Majesty, acting in person or by his officers, to distribute lands according to his pleasure, was unquestioned. That he was in the constant exercise of this power was well known. If the United States were not content to receive the territory charged with the titles thus created, they ought to have made, and they would have made, such exceptions as they deemed necessary. They have made these exceptions. They have stipulated that all grants made since the 24th of January, 1818, shall be null and void. It is understood that this stipulation was intended to embrace three large grants made by the king, which comprehended nearly all the crown lands in East Florida. However this may be, it shows that the subject was in the minds of the negotiators, and that the apprehended mischief was guarded against as far as the parties could agree. The American government was content with the security which this stipulation afforded, and cannot now demand further and additional grounds. The United States were satisfied, and had reason to be satisfied, with the provision excluding grants made subsequent to the 24th of January, 1818, when the fraud on that provision was prevented by the terms of the ratification of the treaty.

This reasoning seems to apply to the present case. The United States were satisfied with the provision excluding grants made after September 25, 1853, and grants made before that time which had not been located and duly recorded, and they cannot now exclude grants made by the State of Sonora. As a matter of fact, almost every grant in the territory ceded by the Gadsden purchase was made by the State of Sonora, and to reject these will be to make the provisions of the treaty almost entirely nugatory.

V AND VI.

The argument in the dissenting opinion herein is so clear on the point that the decree of Santa Anna was null *ab initio*, that no attempt will be made to add to Judge Sluss's opinion.

LOCATION AND EXTENT OF THE GRANT.

The petition of the applicant is set out in full at page 105 of the record. It is for "the public lands adjacent to the ranch of San Pedro." The "said public lands" were taken up and claimed. The words used in the original are "terreno baldio," the usual phrase for unappropriated public lands. No quantity is mentioned as applied for. The tract asked for was stated to be "adjacent to the ranch of San Pedro, as far as the place called Tres Alamos." The decree was for the survey, appraisement and auctions for 30 consecutive days "of the lands indicated in the foregoing petition." The alcalde summoned "the interested party and the adjacent owners" "in order to proceed with the survey of the lands petitioned for," and a survey was concluded, "resulting therefrom four sitios for raising cattle and horses in favor of the aforesaid citizen Rafael Elias, with which he was satisfied, and took possession of the land so segregated, being informed that at the proper time he had to mark all its limits with monuments of stone and mortar, as is by law provided." The alcalde then "proceeded to the appraisement of the land (del terreno)," and the four sitios to which the proceedings referred were auctioned off and title issued thereto.

The amount actually included within the survey somewhat exceeds the exact quantity of four sitios. This

was the case not only in all the Mexican surveys but also in all the early surveys in the United States. Owing to lack of mathematical skill and the want of proper surveying instruments, and owing, also, to the roughness of the country and the lack of care when land had little value, the fixed, natural landmarks designated in the field notes of the survey of this and other grants contain more than the estimated or stated quantity. The familiar rule applies that the metes and bounds control.

This grant cannot be considered one by quantity, or a floating grant, because it was located with reference to a central point, and its southern boundary was taken as the northern boundary of the San Pedro ranch, which lay to the south (rec. p. 107).

Moreover, the record explicitly states (p. 107) that immediately after the survey the grantee "took possession of the land so segregated" by the survey. This juridicial possession determined the bounds of the tract sold. The survey was made by the constitutional alcalde, after summoning the interested party and the adjacent owners, one of whom, as the record shows, was on the ground exhibiting his title papers and pointing out his monument, and the delivery of possession was made on the ground immediately after the survey, as just stated, and was attested by the magistrate. This fixed the limit of the tract surveyed, possessed and afterwards sold. The possession of the whole of the surveyed tract was taken August 21, 1827, more than two-thirds of a century ago, and more than 26 years before the treaty. There is nothing to show that this possession was ever disturbed or the title called in question. On the contrary, the grant was made the subject of sale between Mexican citizens in 1862, and was judicially investigated as to the deraignment of title, as appears on pages 113–125 of the record. This shows that it was then admitted to be valid, and the presumptions arising from the delivery and continuance of possession

are strengthened by the good faith of these conveyances.

It is submitted that the decree of the lower court should be reversed, and a decree entered by this Court confirming the grant to the landmarks called for in the original survey, which are designated by the map offered in evidence by the claimant herein.

ROCHESTER FORD,

Of counsel for appellant.